

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 15, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-2815

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

LESLIE A. WATKINS,

Plaintiff-Appellant,

v.

CITY OF MADISON,
d/b/a MADISON METRO TRANSIT SYSTEM,
and TRANSMIT MUTUAL INSURANCE CORP.
OF WISCONSIN,

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Dane County: MARK J. FARNUM, Reserve Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Leslie A. Watkins appeals from a judgment entered on a jury verdict and from a reconsideration order denying her motion for a new trial. The issue is whether the verdict was impeached by the bailiff's

affirmative nod in response to a juror's question on whether Watkins would receive the money awarded. Because we conclude that the bailiff's nod could not have prejudiced Watkins, we affirm.

Watkins sued the City of Madison ("Madison Metro") for damages from a slip and fall on a city bus. The jury awarded a total of \$25,582.04, but apportioned twenty-five percent negligence to Madison Metro and seventy-five percent negligence to Watkins. During deliberations, a juror asked the bailiff whether Watkins would receive the money awarded by the jury in the damage question. The bailiff nodded affirmatively. Although the bailiff's affirmative response was erroneous, because it disregarded the effect of comparative negligence, it also was improper because he instructed the jurors on the effect of their verdict answers. *McGowan v. Story*, 70 Wis.2d 189, 196, 234 N.W.2d 325, 329 (1975).

Watkins moved for a new trial and for judgment notwithstanding the verdict arguing that the bailiff improperly influenced the jurors. After an evidentiary hearing at which two jurors testified, the trial court ordered a new trial because it concluded that the bailiff injected extraneous material that could bias a reasonable juror and that this probably prejudiced the result. Madison Metro sought reconsideration and, following another evidentiary hearing, the trial court granted reconsideration, entered judgment on the verdict and denied Watkins' motion for a new trial. Watkins appeals from the judgment and order granting reconsideration and denying her motion for a new trial.

The issue is whether the bailiff's gesture, in response to the juror's question, resulted in impeachment of the verdict. To determine verdict impeachment, the court must determine whether the improper evidence is "(1) competent, (2) shows substantive grounds sufficient to overturn the verdict, and (3) shows resulting prejudice." *After Hour Welding, Inc. v. Laneil Management Co*, 108 Wis.2d 734, 738, 324 N.W.2d 686, 689 (1982). The parties do not dispute the competence of the evidence, but focus on the remaining two elements. Although the bailiff's affirmative gesture was improper and substantively erroneous, thereby sufficient to overturn the verdict, we conclude that Watkins has not shown resulting prejudice.

The juror inquired whether Watkins would receive the money awarded in the damage question. Watkins contends that the bailiff's affirmative nod precluded vigorous debate on the comparative negligence questions. However, the juror who witnessed the nod and testified at both postverdict hearings, dissented to the comparative question, and commented extensively on the apportionment of negligence and on damages.¹ The dissenter's comments reflect jury debate on the comparative negligence questions.

On reconsideration, the trial court stated that it assumed that the "hypothetical jury follow[ed] the Court's instructions and determine[d] fault regardless of consequences." See *After Hour Welding*, 108 Wis.2d at 743-44, 324 N.W.2d at 692 (jury decides case on evidence, according to judge's instructions). We conclude that the bailiff's gesture was harmless. If the jurors followed the trial court's instructions on apportioning negligence, there was no resulting prejudice. Conversely, if they were misled by the bailiff to believe that Watkins would receive the amount they awarded, they would have no reason to distort their answers to the comparative negligence questions. Although the bailiff's conduct was improper, it could not have prejudiced Watkins.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ The other dissenter heard the question, but was unaware of a response by the bailiff. Her dissenting comment also addressed the apportionment of negligence.